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Order -99-1-5



UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C.

Issued by the Department of Transportation  
on the 18<sup>th</sup> day of December, 1998

SERVED: January 15, 1999

**1998 U.S. -SOUTH AFRICA THIRD-COUNTRY  
CODE-SHARE OPPORTUNITIES**

**Docket OST-98-4755**

**FINAL ORDER AUTHORIZING THIRD-COUNTRY CODE-SHARE SERVICES**

**Summary**

By this order we make final our tentative decision in Order 98-11-14 and select Delta Air Lines, Inc., to serve Johannesburg, South Africa, under its code-share arrangement with Air France and to issue Delta certificate authority to offer this service.

**Background**

Under the provisions of the U.S.-South Africa Air Transport Agreement, the United States, effective November 1, 1997, may designate two U.S. carriers to serve South Africa under code-share arrangements with third-country carriers.<sup>1</sup> An additional carrier may be authorized effective November 1, 1998, and another effective November 1, 1999.<sup>2</sup> By Order 98-11-14, we tentatively selected Delta to serve South Africa via Paris with Air France, its code-share partner, for the opportunity available November 1, 1998. Objections to our tentative decision were due November 24 and answers to objections were due December 3.

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<sup>1</sup> Northwest Airlines and United Air Lines were selected for the first two opportunities available in 1997. See Orders 97-9-18 and 97-10-14.

## **Responsive Pleadings**

Continental filed an objection to our tentative decision. Delta filed an answer to Continental's objection.

Continental argues that its proposed service at Newark offers advantages over Delta's service at JFK because Continental has a major hub operation at Newark and international passengers prefer to travel via Newark. Continental further argues that the proposed award of third-country code-share authority to Delta based on the number of gateways that Delta would serve will perpetuate the dominance of the largest carrier alliances and will also delay Continental's service to Africa where other carriers, including Delta, already offer service. Finally, Continental states the Department can achieve the public benefits of two new code-share partnerships after one year by awarding U.S.-South Africa authority to Continental now and giving Delta the opportunity to apply again next year with another one of its European partners. Continental argues that such awards would facilitate operations from 11 U.S. gateways from two code-share partnerships after one year. Continental, therefore, urges the Department to reconsider its tentative award, and to select Continental for the 1998 designation for third-country code-share service.

In its reply, Delta argues that Continental has raised no new arguments that were not already considered by the Department in the show-cause order. Furthermore, Delta states that Continental has not refuted the Department's tentative finding that Delta's service from eight U.S. gateways represents a superior service proposal in this proceeding.

## **Decision**

We have decided to make final our tentative decision in Order 98-11-14 to select Delta for the U.S.-South Africa third-country code-share opportunity available November 1, 1998.

As we noted in our show-cause order, all of the U.S. carrier services provided in the U.S.-South Africa market are provided on a code-share basis. Thus, the third-country code-share provisions of the U.S.-South Africa aviation agreement provide valuable opportunities to maximize the level of competitive services available to the public, thereby facilitating development of the market. We also noted that in this case, Continental and Delta offered very similar proposals. Both proposed daily service to Johannesburg via Paris under a code-share arrangement with Air France; both would serve the New York market, the largest U.S.-South Africa market; both were prepared to begin their services upon award of the authority; and both would be new entrants to the South Africa market. After a careful review of the record, we tentatively found that Delta's proposal offered greater public benefits because it would facilitate service at a greater number of U.S. cities, eight, including its two major hubs, and would provide the first U.S. carrier on-line service to a new city, Cincinnati. For these reasons we tentatively found that the combined attributes of Delta's proposal outweighed the benefits of Continental's proposal, which offered service from only two cities, both of which already receive on-line South Africa service from U.S. carriers.

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<sup>2</sup> By Notice dated July 27, 1998, we solicited applications from carriers interested in using the opportunity available November 1, 1998, and stated that we would solicit applications at a later date for the remaining opportunity available in 1999.

We found nothing in Continental's objections to the show-cause order that would lead us to reach a different result.

As stated above, Continental has concentrated on two principal areas in opposing our tentative decision. First, Continental argues that we failed to give sufficient decisional weight to its proposed service from its Newark hub. In fact, we fully recognized the public benefits of Continental's proposed service at Newark in our show-cause order.<sup>3</sup> However, we tentatively concluded that this factor did not afford Continental a decisional advantage in the context of this proceeding and Continental has not now persuaded us otherwise. The fact is, both Continental and Delta proposed service from New York, with Continental serving from Newark and Delta from JFK. Both of these airports currently receive South Africa service from two other U.S. carriers. Although Newark is a hub for Continental, Delta also proposed service from two of its hubs, in addition to its service at JFK, as well as service to five other cities, including one community that does not now receive U.S. carrier on-line service. In these circumstances, while Continental's service from its Newark hub is certainly a positive feature of its proposal, we do not find that it outweighs the combined attributes of Delta's overall proposal.

Second, Continental argues that its selection in this case would stimulate competition by facilitating service by two new hub networks and, thus, would produce greater public benefits than would the selection of Delta. We agree with Continental that maximizing the number of network services competing in the U.S.-South Africa market is an important public interest consideration. Indeed, we included that factor along with the important service factors noted above in tentatively determining that Delta was the better choice in this case. Like Continental, Delta would provide a competing network service to the existing services of Northwest and United, and its proposal presents the additional benefit of offering competing service at a number of communities that would not receive service under Continental's proposal. Thus, we maintain our view that Delta's proposal offers the best combination of service and competitive benefits and warrants its selection in this case.

We note that the U.S.-South Africa agreement provides a further opportunity to accommodate additional service and competition in the market. A fourth service opportunity will be available in November 1999. Continental, as well as any other U.S. carrier, will be free to apply for that opportunity.

As we stated in our show-cause order we will grant Delta's application for a certificate of public convenience and necessity for its proposed third-country code-share services via Paris with Air France. Consistent with our standard practice in limited entry markets, the certificate awarded to Delta is for a five-year period.

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<sup>3</sup> Order 98-11-14, at 4-5.

## ACCORDINGLY,

1. We grant Delta Air Lines, Inc., a certificate of public convenience and necessity, in the form attached, authorizing service between a point or points in the United States and Johannesburg, South Africa, via Paris, France;
2. Unless disapproved by the President of the United States under 49 U.S.C. 41307, this order and the attached certificate shall become effective on the 61st day after its submission for section 41307 review or upon the date of advice from the President or his designee under Executive Order 12597 and implementing regulations that the President does not intend to disapprove the Department's order under that section, whichever occurs earlier;<sup>4</sup>
3. We deny the application of Continental Airlines, Inc., for a certificate of public convenience and necessity to operate U.S.-South Africa third-country code-share services;
4. To the extent not granted, we deny all outstanding requests in Docket OST-98-4755; and
5. We will serve this order on Continental Airlines, Inc.; Delta Air Lines, Inc.; United Air Lines, Inc.; the City of Houston and the Greater Houston Partnership; the Regional Business Partnership (Newark); the Ambassador of South Africa in Washington, D.C.; the Department of State (Office of Aviation Negotiations) and the Federal Aviation Administration (AFS-200).

By:

**PATRICK V. MURPHY**  
**Deputy Assistant Secretary for**  
**Aviation and International Affairs**

(SEAL)

*An electronic version of this order is available on the World Wide Web at  
<http://www.dot.gov/general/orders/aviation.html>.*

This order was submitted for Section 41307 review on December 18, 1998.

On January 13, 1999, we received notification that the President's designee under Executive Order 12597 and implementing regulations did not intend to disapprove the Department's order.

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<sup>4</sup> This order was submitted for section 41307 review on December , 1998. On , we received notification that the President's designee under Executive Order 12597 and implementing regulations, did not intend to disapprove the Department's order.



**Experimental Certificate  
of Public Convenience and Necessity  
for  
Foreign Air Transportation**

**Route  
756**

**This Certifies That**

**Delta Air Lines, Inc.**

**is authorized, subject to the provisions of Subtitle VII of Title 49 of the United States Code, the orders, rules, and regulations issued thereunder, and the attached Terms, Conditions, and Limitations, to engage in foreign air transportation of persons, property, and mail.**

**This Certificate is not transferable without the approval of the Department of Transportation.**

**By Direction of the Secretary**

**Issued by Order 99-1-5  
On December 18, 1998  
Effective on January 13, 1999**

**Patrick V. Murphy  
Deputy Assistant Secretary for  
Aviation and International Affairs**



## Terms, Conditions, and Limitations

### **Delta Air Lines, Inc.**

is authorized to engage in foreign air transportation of persons, property, and mail:

Between a point or points in the United States, the intermediate point Paris, France, and Johannesburg, South Africa.

This authority is subject to the following provisions:

- (1) The holder shall at all times conduct its operations in accordance with the regulations prescribed by the Department of Transportation for the services authorized by this certificate, and with such other reasonable terms, conditions, and limitations as the Department of Transportation may prescribe in the public interest.
- (2) The holder shall at all times conduct its operations in accordance with all treaties and agreements between the United States and other countries, and the exercise of the privileges granted by this certificate is subject to compliance with such treaties and agreements and with any orders of the Department of Transportation issued under them or for the purpose of requiring compliance with them. To the extent that the holder has authority to serve more than one country or points in more than one country on the same route segment, that authority does not confer upon the holder any additional rights (including fifth-freedom intermediate and/or beyond rights) in limited-entry markets unless the holder has been specifically designated to conduct such services and the Department has completed any necessary carrier selection procedures to determine which carrier(s) should be authorized to exercise such rights. In such cases, the fact that the carrier may hold authority to serve the countries (points) at issue on the same segment will not be considered as providing any preference to the holder in a carrier selection proceeding.
- (3) The exercise of the authority granted here is subject to the holder's first obtaining from the appropriate foreign governments such operating rights as may be necessary.

- (4) The holder's authority under this certificate is effective only to the extent that such operations are also authorized by the Federal Aviation Administration.
- (5) The holder shall at all times remain a "Citizen of the United States" as required by 49 U.S.C. 40102(a)(15).
- (6) The holder shall maintain in effect liability insurance coverage as required under 14 CFR Part 205. Failure to maintain such insurance coverage will render a certificate ineffective, and this or other failure to comply with the provisions of Subtitle VII of Title 49 of the United States Code or the Department's regulations shall be sufficient grounds to revoke this certificate.
- (7) Should the holder propose any substantial changes in its ownership, management, or operations (as that term is defined in 14 CFR 204.2(n)), it must first comply with the requirements of 14 CFR 204.5.
- (8) In the event that the holder commences but subsequently ceases all operations for which it was found "fit, willing, and able," its authority under this certificate shall be suspended under the terms of 14 CFR 204.7 and the holder may neither recommence nor advertise such operations unless its fitness to do so has been redetermined by the Department. Moreover, if the holder does not resume operations within one year of its cessation, its authority shall be revoked for dormancy.
- (9) The holder acknowledges that this certificate is granted to determine if the holder's projected services, efficiencies, methods, rates, fares, charges, and other projected results will, in fact, materialize and remain for a sustained period of time, and to determine whether the holder will provide the innovative or low-priced air transportation it proposed in its application for this authority.
- (10) The holder may combine services on this certificate with all services authorized by other Department of Transportation certificates or exemptions, provided, that such operations are consistent with applicable international agreements; and provided further, that (a) nothing in the award of the route integration authority requested should be construed as conferring upon the holder additional rights (including fifth freedom intermediate and/or beyond rights) to serve markets where U.S. carrier entry is limited unless the holder first notifies us of its intent to serve such a market and unless and until the Department has completed any necessary carrier selection procedures to determine which carrier(s) should be authorized to exercise such rights; and (b) should there be a

request by any carrier to use the limited entry route rights that are included in the holder's authority by virtue of the route integration authority granted here, but not being used, the holding of such authority by route integration will not be considered as providing any preference for the holder in a competitive carrier selection proceeding to determine which carrier(s) should be entitled to use the authority at issue.

(11) Exercise of the privileges granted by this certificate is subject to any other reasonable terms, conditions, and limitations that the Department of Transportation may prescribe in the public interest.

This certificate shall become effective January 13, 1999 . It shall expire five years thereafter, unless the Department earlier suspends, modifies or deletes the authority.